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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
)  
1998 Biennial Regulatory Review -- )  
Streamlining of Mass Media Applications, )  
Rules, and Processes )  
)  
Policies and Rules Regarding )  
Minority and Female Ownership of )  
Mass Media Facilities )  
)

MM Docket No. 98-43

MM Docket No. 94-149

To: The Commission

**PETITION FOR RECONSIDERATION OF  
THE COMMISSION'S *REPORT AND ORDER***

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## SUMMARY

Harry J. Pappas and Stella A. Pappas hereby petition the Commission to reconsider the portion of its rules adopted in the *Report and Order* (as hereinafter defined) that provide for the forfeiture of a construction permit if the permit was issued more than three years ago and the permittee has not yet completed construction, except where the delay was the result of certain limited circumstances.

The Pappases believe that such rule constitutes Commission action which is arbitrary and capricious, and is contrary to the intent of Congress. In addition, the newly-adopted rule is inequitable in that it results in permittees such as the Pappases not having been given adequate notice that their stations were required to have been constructed within a three year period.

The Pappases request that the Commission amend the newly adopted rules regarding expiration of construction permits to, at a minimum, give holders of outstanding permits which were granted more than three years ago adequate notice of the new construction period.

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Harry J. Pappas and Stella A. Pappas (the "Pappases"), who hold the construction permit to build new commercial television station WMMF-TV, Fond du Lac, Wisconsin, by counsel and in accordance with Section 1.429 of the Commission's Rules, hereby respectfully petition the Commission to reconsider a portion of the *Report and Order in the Matter of 1998 Biennial Regulatory Review-- Streamlining of Mass Media Applications, Rules, and Processes*, MM Docket No. 98-43 *et. al.* (Released November 25, 1998) 63 Fed. Reg. 243 (published on December 18, 1998) (the "*Report and Order*").

## INTRODUCTION

The Commission, in its *Report and Order*, concluded that a three-year period following the grant by the Commission of a construction permit for a broadcast station “would provide all permittees an adequate and realistic time in which to construct.” *Report and Order*, at para.83. Under the rules adopted by the Commission in the *Report and Order*, where a construction permit was granted over three years ago, but was duly extended pursuant to Section 73.3534(b) of the Commission’s Rules as currently in effect, such permit will automatically expire unless the permittee can show that it was unable to build the station due to delays caused by acts of God, or by administrative or judicial review, in which event the construction period will be deemed to have been tolled for any periods during which such delays impeded construction. The Commission defines administrative or judicial review for purposes of tolling the construction period as including a “cause of action pending before a court of competent jurisdiction relating to any necessary local, state or federal requirement for the construction or operation of the station,” but does not include within such definition the pendency of a zoning or other regulatory application before a local zoning board or other regulatory authority. *Report and Order* at para. 86.

The Pappases have held the construction permit for WMMF-TV (the “Station”) since May, 1995. The Pappases’ efforts to obtain local zoning approvals and comply with

other necessary state and local requirements to construct the Station are a matter of record in this proceeding. *See Comments of Harry J. Pappas, Stella A. Pappas and Skycom, Inc. in MM Docket 98-43*, filed June 16, 1998. Despite the Pappases' diligent efforts to secure such approvals, they so far have been unable to do so, and as a result have been unable to construct the broadcast tower for the Station. Under the new rules regarding expiration of construction permits adopted by the Commission in the *Report and Order* (the "New Rules"), the construction permit for the Station will expire on February 16, 1999.<sup>1/</sup> The New Rules are invalid because they are contrary to the clear intent of Congress, and constitute arbitrary and capricious agency action. In addition, the loss of the construction permit would work a substantial hardship upon the Pappases in that it would result in the loss of considerable resources which the Pappases have expended to obtain the necessary approvals for the Station in reliance upon their expectation of being able to continue to obtain extensions of the permit, and would cause the Pappases and other similarly-situated permittees to be treated in an inequitable manner.

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<sup>1/</sup> An application for an extension of the permit has been pending before the Commission since June, 1998 (File No. BMPCT-980609KF). If this application is granted by February 16, 1999, the permit will remain in effect until the expiration of such extension.

**I. THE COMMISSION'S ADOPTION OF THE NEW RULES WAS ARBITRARY AND CAPRICIOUS**

Agency action which is arbitrary and capricious is unlawful under Section 706 of the Administrative Procedure Act, as amended. 5 U.S.C. §706. A rule adopted by an agency is arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicles Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983).

In determining that construction delays resulting from difficulties in obtaining zoning and other necessary regulatory approvals will not toll the three-year construction period adopted by the Commission in the New Rules, the Commission has acted in an arbitrary and capricious manner. Beyond the conclusory statements that "a three-year construction period would provide all permittees an adequate and realistic time to construct," *Report and Order* at para. 83, and the "three-year period provides ample time to complete [the zoning approval] process and construct the station or choose a new site free from zoning difficulties," *Report and Order* at para. 86, the Commission engaged in no consideration of whether a permittee actually would be able to secure necessary zoning and other regulatory approvals and complete construction within the three-year period. Certainly, the evidence in the record before the Commission indicates that many

permittees will not be able to do so.<sup>2/</sup> Yet, in a blind pursuit of its stated goal of “reduc[ing] paperwork and administrative burdens...and the number of requests for additional time to construct,” *Report and Order* at para. 79, the Commission, without any expressed reasoning process and contrary to the evidence in the record, has determined that all zoning and other necessary regulatory approvals can be secured within a sufficiently brief period of time so as to enable the permittee to complete construction within three years. Such determination is arbitrary and capricious. See *ALLTEL v. FCC*, 838 F.2d 551, 558 (D.C. Cir.) (“Commission must do more than simply ignore comments that challenge its assumptions and must come forward with some explanation that its view is based on some reasonable analysis.”)

Nor does the Commission offer any rationale for its determination to refuse to toll the construction period during the pendency of a zoning application or other application for a necessary regulatory approval before a local zoning board or other governmental authority, but to allow for tolling while the action of such board or authority is under review by a court. *Report and Order* at para. 86. The process of obtaining necessary approvals frequently involves denial by the zoning or other regulatory authority, appeal to

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<sup>2/</sup> See *Report and Order* at para. 82 (“Six of the seven comments received in response to our query as to whether problems in obtaining local zoning authorization are sufficiently beyond the permittee’s control to warrant treatment similar to that of delays caused by administrative and judicial review disagreed with our tentative conclusion that they do not.”)



the courts, and subsequent remand to the authority. These steps are all part of a single integrated process, and the Commission offers no reason, nor points to any evidence in the record, to support its conclusion that the process of pursuing approvals before the relevant regulatory authorities should be treated differently than the review of such authorities' actions by a court. The Commission's determination to extend tolling only to the periods during which the grant or denial of regulatory approvals is under review by a court, and not to extend tolling to the period during which a permittee attempts to obtain such approvals before the regulatory authority itself, is therefore arbitrary and capricious.

## **II. THE NEW RULES ARE CONTRARY TO THE INTENT OF CONGRESS AS EXPRESSED IN THE COMMUNICATIONS ACT OF 1934**

Where the intent of Congress is clear, an agency must give effect to that intent; the agency cannot adopt an interpretation of the language of the statute which would thwart Congressional intent. *Chevron v. Nat'l Resources Defense Council*, 467 U.S. 837 (1984). Section 319(b) of the Communications Act of 1934, as amended (the "Act"), is an example of an instance where the intent of Congress is clear from the plain language of the statute. Section 319(b) of the Act provides that a construction permit shall be forfeited "if the station is not ready for operation within the time specified by the permit, or within such further time as the Commission may allow, *unless prevented by causes not under the control of the grantee.*" 47 U.S.C. 319(b)(emphasis added).

Despite the clear intent of Congress, the Commission in adopting its New Rules fails to recognize any instances where a permittee may be unable to construct due to circumstances not under its control, beyond the very limited situations in which construction is delayed due to an act of God or due to a narrowly defined class of cases involving administrative or judicial review. The Commission takes no account of cases, such as the Pappases', in which the permittee cannot construct for reasons clearly beyond its control, but which do not fall within the Commission's limited definition of circumstances outside of the permittee's control. In the real world there are numerous instances, not covered by the narrow exceptions set forth in the New Rules, in which permittees are unable to construct within three years due to circumstances that are by any reasonable definition beyond their control. In such cases, the permits will expire despite the fact that the permittees were prevented from constructing due to causes not under their control. Such a result is inconsistent with the intent of Congress in enacting Section 319(b) of the Act.

**III. IT IS INEQUITABLE FOR THE COMMISSION TO ADOPT RULES WHICH WOULD CAUSE THE PAPPASES TO BE TREATED FUNDAMENTALLY DIFFERENTLY FROM OTHER PERMITTEES**

Even if the Commission should disagree that its New Rules are contrary to the intent of Congress, or are arbitrary and capricious, the Commission should reconsider those rules and amend them in order to alleviate the inequities and hardships that those

rules will visit upon the Pappases and similarly-situated permittees. The Pappases acquired the permit in May, 1995. At that time, and at all times since then, extensions of broadcast station construction permits were applied for and granted pursuant to Section 73.3534 of the Commission's rules which provides in pertinent part that extensions of time to construct broadcast stations will be granted if "no progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and *zoning problems*)" 47 C.F.R. 73.3534(b)(emphasis added).

In reliance upon that rule, the Pappases have expended considerable resources in attempting to obtain zoning and other local and state regulatory approvals to construct the tower for the Station. Early in the process, the Pappases' predecessor secured the right to use the proposed tower site from the owners of that site, as well as the necessary Federal Aviation Administration Determination of No Hazard for the erection of the tower at that site. Because of the attractiveness of the location at which the Pappases propose to build the tower, and the unavailability of a comparably attractive site, the Pappases have made a business determination to continue to pursue local zoning approvals in order to construct the tower at that location. This determination was completely reasonable, given that the Commission's Rules provided that the construction permit would remain in effect so long as the Pappases could show, at regular intervals, that they were diligently

proceeding to resolve the zoning issues. Had the Pappases known from the outset that they had only three years to construct the Station, they obviously would have taken a different approach: if the zoning approvals had not been perceived to be imminent within the first year or so of the three year period, the Pappases in all likelihood would have sought another site, one that was less attractive but which would have enabled the Pappases to have completed construction of the Station within the prescribed period.<sup>3/</sup>

The Commission's adoption of the New Rules is inequitable and will work a substantial injustice upon permittees such as the Pappases who reasonably relied upon the Commission's current rule in pursuing a particular course of action, only to find now that such course will likely result in the loss of their permits. While the Pappases disagree with the Commission's conclusion that three years is sufficient time to construct a broadcast television station in the face of serious zoning obstacles, if the Commission ultimately decides to implement the three year period it should at least assure that all permittees are treated in substantially the same manner, *i.e.*, that all permittees have adequate notice that any zoning obstacles must be overcome within three years.

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<sup>3/</sup> There is, of course, no assurance that such a site could have been located, or the use of such a site secured, in time to have enabled the Pappases to have completed construction of the Station prior to expiration of the permit. At least, however, the Pappases would have been in substantially the same position as any other permittee, *i.e.*, they would have known from the outset that construction had to be completed within three years.

In order to accomplish that goal, and to redress the inequity which would otherwise be caused by the New Rules, the Commission should, at a minimum, provide that where a construction permit has been duly extended pursuant to the Commission's existing rules, the permittee will have a period of three years from the date of release of the *Report and Order* (i.e., November 25, 1998) in which to complete construction.<sup>4/</sup> Use of the date of release of the *Report and Order* is not inequitable, because that is the point in time at which permittees were first placed on notice by the Commission that reliance on Section 73.3534 of the Commission's Rules with respect to extensions of permits might no longer be warranted.<sup>5/</sup>

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<sup>4/</sup> In the event the Commission adopts such a rule, it should also allow for permittees in the Pappases' position to obtain expedited processing of modification applications for new sites.

<sup>5/</sup> Use of the date of release of the *Notice of Proposed Rulemaking* (the "NPRM") in this proceeding, 13 FCC Rcd 11349(1998), *would* be inequitable because the Commission tentatively concluded in the *NPRM* that the New Rules would not apply to construction permits not in their initial terms. *See NPRM* at para. 68.

Respectfully submitted,

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